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No. 80-1253

In the Supreme Court of the United States

OCTOBER TERM, 1980

VIRGIN ISLANDS, PETITIONER

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 7652(b)(3) of the Internal Revenue Code of 1954 requires that the federal excise tax collected, pursuant to Sections 4081-4083 of the Code, on gasoline sold in the United States, he covered into the treasury of the Virgin Islands insofar as it is collected on the sale of gasoline refined in the Virgin Islands.

2. Whether Section 28(a) of the Revised Organic Act of the Virgin Islands requires that the customs duties collected on goods coming into the United States from the Virgin Islands be covered into the treasury of the Virgin Islands.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the district court (Pet. App. 66a-78a) is not yet officially reported. The opinions of the court of appeals (Pet. App. 1a-63a) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1980. The Court denied a timely petition for rehearing with a suggestion for rehearing en banc on December 18, 1980 (Pet. App. 96a-98a). The petition for a writ of certiorari was filed on January 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent portions of Section 28 of the Revised Organic Act of the Virgin Islands, ch. 558, 68 Stat. 508, and of Sections 4081, 4082, 4083 and 7652 of the Internal Revenue Code of 1954 (26 U.S.C.), are set forth in the Appendix, *infra*, 1a-11a.

STATEMENT

In this action brought against the Secretary of the Treasury, petitioner seeks a declaratory judgment that the excise tax collected since 1966, pursuant to Sections 4081-4083 of the Internal Revenue Code of 1954 (26 U.S.C.), on the sale in the United States of gasoline refined in the Virgin Islands is to be covered into the treasury of the Virgin Islands under Section 7652(b)(3) of the Code,[1] and that the customs duties collected on articles coming into the United States from the Virgin Islands are to be covered into the treasury of the Virgin Islands under Section 28(a) of the Revised Organic Act of the Virgin Islands, ch. 558, 68 Stat. 508. In addition, petitioner seeks an order compelling the Secretary to pay over these taxes and customs duties collected in the past and to be collected in the future into petitioner's treasury.[2]

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[1] Petitioner refers to Section 28(b) of the Revised Organic Act of the Virgin Islands, ch. 558, 68 Stat. 508. Section 28(b) of that Act amended Section 3350 of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)) by adding subsection (c) thereto. The Internal Revenue Code of 1939 was later in the same year repealed by Section 7851 of the Internal Revenue Code of 1954, and Section 7652(b)(3) of the 1954 Code succeeded Section 3350(c) of the 1939 Code.

[2] A similar claim has been made with respect to gasoline tax by Puerto Rico under Section 7652(a)(3) of the Internal

The pertinent facts are undisputed and may be summarized as follows: Since 1966, gasoline has been refined in the Virgin Islands. Some of the gasoline has been transported to the United States and sold. The sale of this gasoline was subject to a tax that has been levied since 1932 on all gasoline "sold by the producer or importer" in the United States. Revenue Act of 1932, ch. 209, Section 617, 47 Stat. 266 (now Sections 4081-4083 of the Internal Revenue Code of 1954 (26 U.S.C.)). None of the revenues derived from the tax on the sale in the United States of gasoline refined in the Virgin Islands has been covered over to the Virgin Islands (Pet. App. 26a, 28a).

United States Treasury officials have collected customs duties on items coming into the United States from the Virgin Islands to the extent that they were dutiable. These duties have always been covered into the United States Treasury (Pet. App. 2a).

In 1975, the Department of the Interior, acting at the request of petitioner's governor, asked the Department of Justice to consider whether: (1) petitioner was entitled under Section 7652(b)(3) of the Code

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Revenue Code of 1954 in *Commonwealth of Puerto Rico* v. *Blumenthal*, Nos. 79-1020, 79-1024 (D.C. Cir. Oct. 17, 1980), petition for a writ of cert. pending, No. 80-1252. In that case, Puerto Rico claims that it is entitled under Section 7652(a)(3) to the tax collected on the sale in the United States of gasoline refined in Puerto Rico. As we discuss (*infra*, pages 7-8), the controlling provision of the statute, upon which Puerto Rico relies, is in all essential respects identical to that upon which petitioner relies (Pet. App. 28a-29a). The cases were heard together in the court of appeals, and a single opinion dealt with the claims to proceeds of the tax on the sale of gasoline (Pet. App. 3a-63a). Puerto Rico makes no claim with respect to customs duties. The court of appeals dealt with the claim of the Virgin Islands to custom duties in a separate opinion (Pet. App. 1a-22a).

to the taxes on the sale in the United States of gasoline refined in the Virgin Islands; and (2) whether petitioner was entitled under Section 28(a) of the Revised Organic Act of the Virgin Islands, to the customs duties collected on dutiable goods coming into the United States from the Virgin Islands (Pet. App. 5a, 106a-110a). Petitioner had previously presented claims for the gasoline taxes and customs duties to the Secretary of the Treasury on November 18, 1974. In a letter dated October 3, 1975, the Assistant Attorney General, Office of Legal Counsel, Department of Justice, concluded that petitioner was entitled neither to the taxes on the sale in the United States of gasoline refined in the Virgin Islands nor to the customs duties collected on dutiable goods coming into the United States from the Virgin Islands (Pet. App. 5a; V.I.A. 105-111).[3]

On May 21, 1976, petitioner instituted this action in the United States District Court for the District of Columbia.[4] That court held that petitioner was entitled to the tax collected on the sale in the United States of gasoline refined in the Virgin Islands and to the customs duties collected on articles coming into the United States from the Virgin Islands.[5] The

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[3] "V.I.A." references are to the separately bound record appendix filed in the court of appeals.

[4] In the district court, the Secretary contested the jurisdiction of the court to hear this case (V.I.A. 19-20). In ruling on the merits, the district court implicitly rejected the Secretary's jurisdictional arguments.

[5] The district court, however, denied petitioner's claim for the oil import license fees imposed since 1973 by Presidential Proclamation No. 4210, 38 Fed. Reg. 9648 (1973), as amended, under Section 232(b), Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 877, as amended.

district court determined that with respect to the gasoline tax, petitioner's claim was virtually identical to the claim made by Puerto Rico in *Commonwealth of Puerto Rico* v. *Blumenthal*, and that for the reasons given in its decision in that case (Pet. App. 80a-91a), petitioner was likewise entitled to the tax collected upon the sale in the United States of gasoline refined in the Virgin Islands (Pet. App. 67a).

With respect to petitioner's claim for the customs duties, the district court held that the customs duties referred to in Section 28(a) of the Revised Organic Act included the customs duties imposed on goods coming into the United States from the Virgin Islands. As the district court saw the matter, Congress could not have referred only to the duties imposed on items coming into the Virgin Islands because they involved only insignificant amounts of revenue (Pet. App. 10a-12a, 28a-29a, 66a-75a).[6]

On appeals by both parties, the court of appeals reversed (Pet. App. 1a-63a). It held that petitioner was not entitled under Section 7652(b)(3) to the revenues from the sale in the United States of gasoline refined in the Virgin Islands, and was not entitled under Section 28(a) of the Revised Organic Act to the customs duties imposed on items coming into the United States from the Virgin Islands. The court of appeals agreed with the district court and the parties that the statute upon which the Virgin Islands relied for its claim to the taxes on the sale

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[6] The district court held against petitioner with respect to its claim for oil import license fees. In so ruling, it rejected petitioner's contention that the oil import license fees were customs duties. The district court reasoned that not all levies on imports are customs duties and that the oil import license fees served purposes fundamentally different from those underlying customs duties (Pet. App. 75a-76a).

of gasoline was in all essential aspects identical to that relied upon by Puerto Rico and had been so designed by Congress. The court concluded that the statutory phrase "produced in the Virgin Islands [Puerto Rico] and transported to the United States" referred to the events that trigger the imposition of such taxes that are to be covered into the petitioner's treasury, and that any other interpretation would lead to the absurd result of requiring the Secretary to turn over to petitioner the tax (*e.g.*, gift, estate or sales tax) on any transaction in the United States in which Virgin Islands goods are involved. The court accordingly concluded that the only taxes to be turned over to petitioner were the equalization taxes (which are imposed on items produced in the Virgin Islands and coming into the United States by Section 7652(b)(1) of the 1954 Code), and that the tax on the sale of gasoline was not an equalization tax.

With respect to the customs duties, the court of appeals ruled that Section 28 covered over only the customs duties collected by the Secretary on items coming into the Virgin Islands. As the court further noted, in the absence of Section 28(a), the customs duties collected on items coming into the Virgin Islands would have been covered into the United States Treasury. Finally, the court of appeals observed that the history of Section 28(a) with respect to customs duties showed that Congress intended to adhere to the consistent administrative practice under the prior act using the same language.

As a result of its rulings against petitioner with respect to the gasoline tax and the customs duties, the court did not address the jurisdictional issues of sovereign immunity, the tax exception to the Declaratory Judgment Act, and the statute of limitations raised by

the Secretary's appeal.[7] Moreover, the court found it unnecessary to discuss the Secretary's contention with respect to the Highway Revenue Act of 1956 (Pet. App. 1a-63a).

ARGUMENT

1. Petitioner bases its claim for the payment of the gasoline taxes collected, pursuant to Sections 4081-4083 of the Internal Revenue Code of 1954 (26 U.S.C.), on the sale in the United States of gasoline refined in the Virgin Islands on Section 7652(b)(3) of the Code (App., *infra*, 8a-10a). That Section provides, with a limitation as to the amount, for covering into petitioner's treasury taxes collected "under * * * the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States." As the parties and the courts below recognized (Pet. App. 28a-29a, 67a), a virtually identical question involving taxes on gasoline sold in the United States is involved in the *Puerto Rico* case.[8] Section 7652(b)(1), enacted originally in 1917 as Section 1000 of the Act of Oct. 3, 1917, ch. 63, 40 Stat. 325, parallels Section 7652(a)(1), enacted originally as Section 3 of the Act of Apr. 12, 1900, ch. 191, 31 Stat. 77 (commonly known as the Foraker Act).

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[7] In view of this action, we have filed a conditional cross-petition on behalf of the Secretary of the Treasury. That petition seeks review by this Court only in the event it grants the Virgin Islands' petition in this case.

[8] Indeed, petitioner has incorporated by reference the reasons given by Puerto Rico in No. 80-1252 for granting the writ of certiorari (Pet. 22 n.17). We hereby incorporate the response of the Secretary in No. 80-1252 to Puerto Rico's contentions, and are serving a copy of our response in No. 80-1252 upon counsel for the Virgin Islands.

Section 7652(b)(3), enacted originally in 1954, parallels Section 7652(a)(3). Indeed, with the exception of the limitation as to amount, Congress intended to provide the same treatment for petitioner under Section 7652(b)(3) that Puerto Rico was accorded under the provisions now embodied in Section 7652(a)(3) of the Code, App., *infra*, 7a (Pet. App. 29a).[9] For the reasons set forth in our brief in opposition in the *Puerto Rico* case, we submit that the tax on the sale of gasoline refined in the Virgin Islands is not to be covered over to the treasury of petitioner.

Petitioner contends (Pet. 22) that the provision with respect to limitation on the amount to be covered over indicates that more than simply the equalization taxes were to be covered over. But the limitation on the amount has nothing to do with determining which taxes are to be covered over. Only after it is determined which taxes are to be covered over does the provision limiting the amount come into play.[10]

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[9] See S. Rep. No. 1271, 83d Cong., 2d Sess. 4, 19, 26 (1954); *To Revise the Organic Act of the Virgin Islands: Hearings on H.R. 2644 Before the House Subcomm. on Territories and Insular Possessions*, 82d Cong., 2d Sess. 49, 87 (1952); Report to the Members of the Senate Comm. on Interior and Insular Affairs, 83d Cong., 2d Sess., *Virgin Islands Report* 17, 66-68, 73, 91-92 (Comm. Print 1954).

[10] The language quoted by petitioner (Pet. 22) from S. Rep. No. 1271, *supra*, at 4, to the effect that the internal revenue taxes to be covered over to petitioner were those "internal revenue taxes paid by mainland consumers on Virgin Islands products imported into the mainland," was not intended as an accurate description of the nature of the taxes to be covered over. See *Gurley* v. *Rhoden*, 421 U.S. 200, 206-207 (1975). Indeed, the next sentence in that report pro-

2. a. Petitioner also claims entitlement to the customs duties on articles coming into the United States from the Virgin Islands, *i.e.*, the customs duties on articles containing foreign material to the value of more than 50 per centum of their total value (Pet. App. 9a n.20). In support of its argument, petitioner invokes Section 28(a) of the Revised Organic Act of the Virgin Islands (App., *infra*, 3a-4a), which provides in pertinent part for the payment to the Virgin Islands of "[t]he proceeds of customs duties, the proceeds of the United States income tax, the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and the proceeds of all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands * * *."

The court of appeals correctly recognized that unless some limitation were stated or implicit in the statute, Section 28(a) might be read to require that the proceeds of all United States customs duties and

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vides that "[t]hese revenues are primarily exicse [*sic*] taxes on Virgin Islands rum * * *." S. Rep. No. 1271, *supra*, at 4. Those taxes had been imposed under the predecessor of Section 7652(b)(1) and were to equalize the taxes imposed on the distillation of domestic rum. Those taxes were paid only indirectly by the consumers. There is no tax imposed on gasoline coming from the Virgin Islands simply because it is brought into the United States. The next paragraph of the Senate Report provided that the grant of taxes being made to petitioner was similar to the grant of taxes made to Puerto Rico. Senator Butler, who wrote the report, also sponsored S. 1014, 80th Cong., 1st Sess. (1947) (cited by the court below, Pet. App. 50a-52a). He was aware of the Treasury's position that the only taxes covered over to Puerto Rico were those taxes imposed by the predecessor of Section 7652(a)(1) and did not include taxes on the sale of items in the United States. He was also aware that the proposed legislation with respect to the Virgin Islands was to operate in parallel fashion. The Senator made no suggestion in S. Rep. No. 1271 that he was departing from the Treasury's understanding.

all income taxes collected anywhere be paid to the Virgin Islands—a reading the court properly rejected as absurd (Pet. App. 12a). Accordingly, the court properly undertook "a closer examination of Congressional intent as revealed by the structure of the statute and its legislative history" (Pet. App. 13a). After reviewing the structure of Section 28, the court of appeals recognized that the provisions for covering over taxes levied upon the inhabitants of the Virgin Islands and the various fees collected in the Virgin Islands revealed that Congress intended to cover over only those customs duties, taxes and fees that had some substantial connection with the Virgin Islands. The connection with the Virgin Islands required by Section 28(a) is the fact of collection in the Islands (Pet. App. 13a-18a). There can be no doubt that collection in the Virgin Islands is the focal point of Section 28(a). Indeed, the statutory phrase "collected in the Virgin Islands" is the only modification provided by Section 28(a).[11]

There is nothing in Section 28(a) that suggests that the customs duties that are to be paid over to the Virgin Islands are customs duties on goods coming into the United States from the Virgin Islands. Petitioner gratuitously interpolates the phrase "on goods coming into the United States from the Virgin Islands" into Section 28(a) after "customs duties." But nothing in the text of the statute supports such a variant reading. Section 28(d) of the Revised Organic Act, ch. 558, 68 Stat. 509, provides that "articles, the growth or product of, or manufactured in, such islands, from

[11] We recognize that the court of appeals found that collection in the islands to be the nexus required by reading all of Section 28 and that the phrase "collected in the Virgin Islands" in that Section does not grammatically modify "customs duties" (Pet. App. 12a-17a).

materials grown or produced in such islands or in the United States" shall enter the United States duty free, continuing the same provision in Section 3 of the Act of Mar. 3, 1917, ch. 171, 39 Stat. 1133. Only if such goods contain foreign materials to the value of more than fifty (originally, twenty) percent of total value are they dutiable in the United States. Otherwise, Section 3 of the 1917 Act and Section 28(d) of the 1954 Revised Organic Act have provided that goods coming into the United States from the Virgin Islands are subject to the same duties as like goods from foreign countries.[12] No one has suggested any reason, based on either the terms or the history of the relevant statutes, or otherwise, why customs duties on foreign, or primarily foreign, goods coming into the United States through the Virgin Islands should be remitted to the Virgin Islands.

The court of appeals correctly pointed out that the function of Section 28(a) is to insure that the customs duties collected on items entering the Virgin Islands are covered into petitioner's treasury. Customs duties have always been collected in the Virgin Islands by officials of the United States Treasury Department (Pet. App. 13a-14a n.30). Were it not for Section 28(a), those officials would be required to pay over the moneys collected on items entering the Virgin Islands into the United States Treasury. Rev. Stat., Section 3617 (31 U.S.C. 484).[13] The covering over of

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[12] This provision was designed to avoid the impact of the Insular Cases (*De Lima* v. *Bidwell*, 182 U.S. 1 (1901); *Downes* v. *Bidwell*, 182 U.S. 244 (1901)).

[13] During the years preceding the enactment of the Revised Organic Act, the customs duties on articles coming into the Virgin Islands were by no means insignificant. In the Annual Report of the Governor of the Virgin Islands to the Secretary of the Interior for the fiscal year ended June 30, 1948, page 4, the Governor indicated that the customs duties

customs on such items is all that that part of Section 28(a) is designed to accomplish.

b. The court below also correctly recognized (Pet. App. 18a-21a) that Congress was aware of the Treasury's longstanding administrative practice with respect to customs duties under prior statutes containing similar language and had not seen fit to alter the statutory language or the administrative interpretation.

The genesis of the provision in Section 28(a) of the Revised Organic Act covering over customs duties is Section 5 of the Act of Mar. 3, 1917, ch. 171, 39 Stat. 1133. Section 4 of that Act (App., *infra*, 1a-2a), had continued in force, with exceptions for goods from the United States, the existing Danish laws imposing taxes and customs duties in the Virgin Islands. Section 5, App., *infra*, 2a, then provided that "the duties and taxes collected in pursuance of this Act" were not to be covered into the general fund of the United States Treasury, but were to be used and expended for the government and benefit of the Islands.

Only 40 days after the enactment of the 1917 Act, the Comptroller of the Treasury determined on the basis of the statutory language and of its legislative history that the only duties collected under Section 5

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collected in the municipality of St. Thomas and St. John were one of three principal sources of revenue for that municipality. On the other hand, from 1936 through 1953, the receipts from passport fees rarely exceeded $200 annually in either the municipality of St. Croix or the municipality of St. Thomas and St. John. See Annual Reports of the Governor of the Virgin Islands to the Secretary of the Interior for fiscal years ended June 30, 1936, through June 30, 1953; 84 Cong. Rec. 4526 (1939). The district court's reasoning (Pet. App. 75a) that Congress could not have been concerned with the customs duities coming into the Islands simply ignores the crucial facts.

"in pursuance of this Act" were those collected in the Virgin Islands. The customs duties collected in the United States on items coming through or from the Virgin Islands were imposed under the existing general tariff law, and were only confirmed by Section 3 of the 1917 Act (23 Comp. Dec. 575 (1917); Pet. App. 6a-7a). This rationale was adopted by the Attorney General in 1926 (35 Op. Att'y Gen. 63; Pet. App. 7a) in holding that the internal revenue taxes collected on the Virgin Islands products coming into the United States were not to be turned over to the Virgin Islands under Section 5 of the 1917 Act.[14]

The function of Section 5 of the 1917 Act was embodied in Section 35 of the Organic Act of the Virgin Islands of the United States, ch. 699, 49 Stat. 1816 (commonly known as the 1936 Organic Act), which provided in pertinent part for the covering into the treasury of the Virgin Islands "the proceeds of customs duties, less the cost of collection, and the proceeds of the United States income tax, and the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands * * *." In the enactment of this provision, Congress intended to continue the "system which prevails under the existing law" (80 Cong. Rec. 6609 (1936)) and to cover over only those duties collected "within * * * its [the Virgin Islands] borders" (H.R. Rep. No. 2637, 74th Cong., 2d Sess. 3 (1936); S. Rep. No. 1974, 74th Cong., 2d Sess. 3 (1936); 80 Cong. Rec. 6609 (1936)).[15]

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[14] Petitioner agrees (Pet. 6 n.3) that the 1917 Act did not refer to the covering over of United States internal revenue taxes to the Virgin Islands.

[15] In Section 36 of the 1936 Organic Act of the Virgin Islands, ch. 699, 49 Stat. 1816, Congress imposed uniform

Beginning in 1938, bills were introduced in Congress to appropriate to petitioner the taxes collected under the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States.[16] Likewise, several bills were introduced to amend Section 3 of the Act of March 3, 1917, to increase the value of foreign materials that could be included in items coming from the Virgin Islands duty-free.[17] The purpose of increasing the number of items that could come into the United States duty-free from the Virgin Islands was to encourage the establishment of new industries in the Virgin Islands and to bring in additional revenue for the islands (S. Rep. No. 2368, 81st Cong., 2d Sess. 2 (1950)). At no time was any request made of Congress for the customs duties collected in the United States on articles coming from the Virgin Islands.[18]

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customs duties on items coming into the Virgin Islands and provided for the Secretary of the Treasury to collect them. Not until 1977 did Congress allow petitioner to alter these customs duties. Section 301(c) of Act of Oct. 15, 1977, Pub. L. No. 95-134, 91 Stat. 1163, allowed petitioner to lower, but not raise, its customs duties on articles coming into the Virgin Islands. *Trust Territory of the Pacific Islands—Appropriations: Hearing on H.R. 6550 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 47-49 (1977); S. Rep. No. 95-332, 95th Cong., 1st Sess. 11 (1977).

[16] See, *e.g.*, H.R. 10576, 75th Cong., 3d Sess. (1938), 83 Cong. Rec. 6518 (1938). We have found 19 such bills introduced in various Congresses between 1938 and 1954 (see also V.I.A. 99-100).

[17] See, *e.g.*, S. 2436, 80th Cong., 2d Sess. (1948), 94 Cong. Rec. 4007 (1948). This amendment was enacted in the Act of Sept. 7, 1950, ch. 910, 64 Stat. 784.

[18] As the court of appeals pointed out (Pet. App. 8a), in 1941, the Secretary of the Interior had requested the Attorney General to reconsider the opinion expressed in 1926 by his

Since Section 28(a) of the Revised Organic Act is virtually identical to the quoted portion of Section 35 of the 1936 Organic Act, the understanding and administrative practice with respect to the prior statute is entitled to great weight in determining the meaning of the present statute. As the court of appeals correctly pointed out (Pet. App. 18a-21a), there is absolutely nothing in the enactment of Section 28(a) that suggests any disapproval of the prior administrative practice. Indeed, the Secretary of the Interior noted that the provision with respect to covering over customs duties was "like the present organic act" (S. Rep. No. 1271, 83d Cong., 2d Sess. 15 (1954)). The same Committee Report also suggested that the only customs duties to be turned over were those that were being turned over under the 1936 Act, *i.e.*, the customs duties on items coming into the Virgin Islands (Pet. App. 21a). By adopting a new law incorporating sections of a prior law, Congress can, under these circumstances, be presumed to have knowledge of the interpretation given to the incorporated law and to have approved that construction of the reenacted provision. *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); *United States* v. *Stowe-Woodward, Inc.*, 306 F.2d 678, 680-681 (1st Cir. 1962), cert. denied, 371 U.S. 949 (1963).[19] Indeed, until this suit, pe-

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predecessor with respect to covering over the internal revenue taxes and the opinion expressed by the Comptroller General with respect to the customs duties. The Attorney General, however, adhered to the prior opinions. The Department of the Interior sought legislation with respect to the covering over of internal revenue taxes, but sought no legislation with respect to customs duties levied in the United States on items coming from the Virgin Islands.

[19] The various cases on statutory construction cited by petitioner (Pet. 20-21) do not support its position. For example, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328

titioner had not disagreed with the Secretary's interpretation.[20] In supporting an application in 1966 by the Hess Oil Company for an oil import allocation for the importation of petroleum from the Virgin Islands into the United States, one of the benefits that petitioner's governor stated would accrue to the United States from granting this allocation was the customs duties (as much as $6,000,000) to be paid into the United States Treasury (V.I.A. 73, 77).

Petitioner's contention (Pet. 18-19) that the court of appeals did not consider Section 28 of the Revised Organic Act in its legislative context is not correct. To the contrary, the court of appeals found that the Secretary's interpretation was supported by the scheme of the statute, the legislative history, and the longstanding administrative construction. Con-

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U.S. 275 (1946), does not deal with congressional approval of prior administrative construction of reenacted language. By its own terms, *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978), does not apply where the statutory language is, as petitioner admits (Pet. 17-18), ambiguous. Further, this case does not involve an erroneous administrative construction. In order to make its argument, petitioner has simply ignored the 1936 Organic Act, from which the language of the current statute was drawn, and has further ignored the fact that the Treasury has been responsible for the collection and covering over of customs duties.

[20] Petitioner errs in contending (Pet. 20) that it was without power to bring this action before it had an elected governor. As early as 1962, the Attorney General of the Virgin Islands was accorded the power and duty to represent the executive branch of the government of the Virgin Islands in civil proceedings in which the government had an interest. V.I. Code Ann. tit. 3, § 114(a)(1) (1967). In suggesting that the Attorney General of the Virgin Islands could have brought this suit, we do not mean to suggest that the district court then or now had jurisdiction to entertain the suit.

trary to petitioner's suggestion (Pet. 20), the fact that the Revised Organic Act was to become a new basic charter of government does not undermine the relevance of the virtually identical prior statute and the administrative construction of it by the Treasury.

3. Contrary to petitioner's final claim (Pet. 16), the decision below has not required it to seek additional funds from Congress. Congress has, by statute, provided the Virgin Islands with revenue sources from, among others, customs duties on goods coming into the Islands and from income taxes on individuals and corporations located in the Virgin Islands.[21] Congress has also from time to time made a variety of specific grants and general appropriations to the Islands.[22] The local government may not amend federal

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[21] In the Act of July 12, 1921, ch. 44, 42 Stat. 123, Congress provided:

> That the income tax laws now in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, except that the proceeds of such taxes shall be paid into the treasuries of said islands.

The effect of this provision was to create a separate income tax structure for the Virgin Islands largely mirroring the provisions of the federal income tax laws. It was felt that turning over income tax revenues to the Virgin Islands was consistent with the prior treatment whereby Congress "allowed them to use the revenues they collect for the support of their government." 61 Cong. Rec. 3137 (1921).

[22] See, *e.g.*, approximately $3,000,000 in the Second Supplemental Appropriations Act, 1975, Pub. L. No. 94-32, 89 Stat. 177; $8,500,000 in the Supplemental Appropriations Act, 1977, Pub. L. No. 95-26, 91 Stat. 72 (see also Section 4, Act of Aug. 19, 1976, Pub. L. No. 94-392, 90 Stat. 1195); $14,000,000 in the Second Supplemental Appropriations Act, 1978, Pub. L. No. 95-355, 92 Stat. 527 (see also Section 402 of the Act

tax laws, may, since 1977, lower but not raise customs duties, and can and does rebate amounts of taxes and customs duties to businesses in the Islands. In fiscal 1978, petitioner received approximately $238 million under these federal laws, including $157 million from customs duties on goods coming into the Islands. But after allowing rebates or subsidies to local businesses in the amount of $175 million, the net yield to the local government was only $62 million.[23] There is little reason why customs duties on essentially foreign goods coming into the United States through the Virgin Islands should be covered over to petitioner to enable it to continue the fiscal policies outlined in the Report of the Secretary of the Interior. If petitioner had retained more of the amounts that Congress had provided for it, there would have been less need for the funds it seeks to gain through litigation. Congress has indeed been generous to petitioner in providing it with funds for its fiscal independence. However, it never intended petitioner to have the funds it seeks in this suit.

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of Oct. 15, 1977, Pub. L. No. 95-134, 91 Stat. 1163). For some specific grants, see U.S. Department of the Interior, Office of Territorial Affairs, *The Economy of the U.S. Virgin Islands* 75 (June 20, 1979).

[23] See Report of the Secretary of the Interior to the Speaker of the House of Representatives, dated June 29, 1979, at 3, as required by Section 4(d) of the Act of Aug. 18, 1978, Pub. L. No. 95-348, 92 Stat. 491, and attached Report, dated June 1979, of the United States Comptroller for the Virgin Islands, to the Secretary of the Interior, at 2, 16-17.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1981

APPENDIX

Act of Mar. 3, 1917, ch. 171, 39 Stat. 1132 *et seq.*:

* * * * *

Sec. 3. That on and after the passage of this Act there shall be levied, collected, and paid upon all articles coming into the United States or its possessions, from the West Indian Islands ceded to the United States by Denmark, the rates of duty and internal-revenue taxes which are required to be levied, collected, and paid upon like articles imported from foreign countries: *Provided*, That all articles, the growth or product of, or manufactured in such islands from materials the growth or product of such islands or of the United States, or of both, or which do not contain foreign materials to the value of more than twenty per centum of their total value, upon which no drawback of customs duties has been allowed therein, coming into the United States from such islands shall hereafter be admitted free of duty.

Sec. 4. That until Congress shall otherwise provide all laws now imposing taxes in the said West Indian Islands, including the customs laws and regulations, shall, in so far as compatible with the changed sovereignty and not otherwise herein provided, continue in force and effect, except that articles the growth, product, or manufacture of the United States shall be admitted there free of duty: *Provided*, That upon exportation of sugar to any foreign country, or the shipment thereof to the United States or any of its possessions, there shall be levied, collected, and paid thereon an export duty of $8 per ton of

two thousand pounds irrespective of polariscope test, in lieu of any export tax now required by law.

Sec. 5. That the duties and taxes collected in pursuance of this Act shall not be covered into the general fund of the Treasury of the United States, but shall be used and expended for the government and benefit of said islands under such rules and regulations as the President may prescribe.

* * * * *

Revised Organic Act of the Virgin Islands, ch. 558, 68 Stat. 497 *et seq.*:

* * * * *

Sec. 8. (a) The legislative authority and power of the Virgin Islands shall extend to all subjects of local application not inconsistent with this Act or the laws of the United States made applicable to the Virgin Islands, but no law shall be enacted which would impair rights existing or arising by virtue of any treaty or international agreement entered into by the United States, nor shall the lands or other property of nonresidents be taxed at a higher rate than the lands or other property of residents.

* * * * *

(c) The laws of the United States applicable to the Virgin Islands on the date of approval of this Act, including laws made applicable to the Virgin Islands by or pursuant to the provisions of the Act of June 22, 1936 (49 Stat. 1807), and all local laws and ordinances in force in the Virgin Islands, or any part thereof, on the date of approval of this Act shall, to the extent they are not inconsistent with this Act,

continue in force and effect until otherwise provided by the Congress: *Provided*, That the legislature shall have power, when within its jurisdiction and not inconsistent with the other provisions of this Act, to amend, alter, modify, or repeal any local law or ordinance, public or private, civil or criminal, continued in force and effect by this Act, except as herein otherwise provided, and to enact new laws not inconsistent with any law of the United States applicable to the Virgin Islands, subject to the power of Congress to annul any such Act of the legislature.

* * * * *

Sec. 28. (a) The proceeds of customs duties, the proceeds of the United States income tax, the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and the proceeds of all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands, less the cost of collecting all of said duties, taxes, and fees, shall be covered into the treasury of the Virgin Islands, and shall be available for expenditures as the Legislature of the Virgin Islands may provide: *Provided*, That the term "inhabitants of the Virgin Islands" as used in this section shall include all persons whose permanent residence is in the Virgin Islands, and such persons shall satisfy their income tax obligations under applicable taxing statutes of the United States by paying their tax on income derived from all sources both within and outside the Virgin Islands into the treasury of the Virgin Islands: *Provided further*, That nothing in this Act shall be construed

to apply to any tax specified in section 3811 of the Internal Revenue Code.

(b) Subchapter B of chapter 28 of the Internal Revenue Code is amended by adding to section 3350 thereof the following subsection:

"(c) *Disposition of Internal Revenue Collections.*—Beginning with the fiscal year ending June 30, 1954, and annually thereafter, the Secretary of the Treasury shall determine the amount of all taxes imposed by, and collected during the fiscal year under, the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States. The amount so determined less 1 per centum and less the estimated amount of refunds or credits shall be subject to disposition as follows:

"(i) There shall be transferred and paid over to the government of the Virgin Islands from the amounts so determined a sum equal to the total amount of the revenue collected by the government of the Virgin Islands during the fiscal year, as certified by the Government Comptroller of the Virgin Islands. The moneys so transferred and paid over shall constitute a separate fund in the treasury of the Virgin Islands and may be expended as the legislature may determine: *Provided*, that the approval of the President or his designated representative shall be obtained before such moneys may be obligated or expended."

* * * * *

(d) There shall be levied, collected, and paid upon all articles coming into the United States or its possessions from the Virgin Islands the

rates of duty which are required to be levied, collected, and paid upon like articles imported from foreign countries, and the internal revenue taxes imposed by section 3350 of title 26, United States Code: *Provided*, That all articles, the growth or product of, or manufactured in, such islands, from materials grown or produced in such islands or in the United States, or both, or which do not contain foreign materials to the value of more than 50 per centum of their total value, upon which no drawback of custom duties has been allowed therein, coming into the United States from such islands shall be admitted free of duty. In determining whether such a Virgin Islands article contains foreign material to the value of more than 50 per centum, no material shall be considered foreign which, at the time the Virgin Islands article is entered, or withdrawn from warehouse, for consumption, may be imported into the continental United States free of duty generally.

* * * * *

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 4081. IMPOSITION OF TAX.

(a) *In general.* [as amended by Section 201(b), Federal-Aid Highway Act of 1961, Pub. L. No. 87-61, 75 Stat. 123]—There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon.

* * * * *

SEC. 4082. DEFINITIONS.

(a) *Producer.* [as amended by section 201(e)(1), Federal-Aid Highway Act of 1959, Pub.

L. No. 86-342, 73 Stat. 615]—As used in this subpart, the term "producer" includes a refiner, compounder, blender, or wholesale distributor, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer. Any person to whom gasoline is sold tax-free under this subpart shall be considered the producer of such gasoline.

* * * * *

(c) *Certain uses defined as sales.* [as amended by Section 205(c)(6), Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 242]—If a producer or importer uses (otherwise than in the production of gasoline or of special fuels referred to in section 4041) gasoline sold to him free of tax, or produced or imported by him, such use shall for the purposes of this chapter be considered a sale.

* * * * *

SEC. 4083. [as amended by Section 1906(b)(13)(A), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1834] EXEMPTION OF SALES TO PRODUCER.

Under regulations prescribed by the Secretary the tax imposed by section 4081 shall not apply in the case of sales of gasoline to a producer of gasoline.

SEC. 7652. SHIPMENTS TO THE UNITED STATES.

(a) *Puerto Rico.*—

(1) *Rate of tax.* [as amended by Section 204(17), Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, 72 Stat. 1430]—Except as provided in section 5314, articles of merchandise of Puerto Rican

manufacture coming into the United States and withdrawn for consumption or sale shall be subject to a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture.

(2) *Payment of tax.* [as amended by Section 1906(b)(13)(A), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1834]—The Secretary shall by regulations prescribe the mode and time for payment and collection of the tax described in paragraph (1), including any discretionary method described in section 6302(b) and (c). Such regulations shall authorize the payment of such tax before shipment from Puerto Rico, and the provisions of section 7651(2)(B) shall be applicable to the payment and collection of such tax in Puerto Rico.

(3) *Deposit of internal revenue collections.* [as amended by Section 808(b)(3), Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, 79 Stat. 164]—All taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and transported to the United States (less the estimated amount necessary for payment of refunds and drawbacks), or consumed in the island, shall be covered into the treasury of Puerto Rico.

(b) *Virgin Islands.*—

(1) *Taxes imposed in the United States.* [as amended by Section 204(18), Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, 72 Stat. 1430]—Except

as provided in section 5314, there shall be imposed in the United States, upon articles coming into the United States from the Virgin Islands, a tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture.

* * * * *

(3) *Disposition of internal revenue collections.* [as amended by Section 10(a), Act of Jan. 2, 1976, Pub. L. No. 94-202, 89 Stat. 1141, and Sections 1906(a)(55), 1906(b)(13)(A), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1832, 1834]—Beginning with the calendar quarter ending September 30, 1975, and quarterly thereafter, the Secretary shall determine the amount of all taxes imposed by, and collected during the quarter under, the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States. The amount so determined less 1 percent and less the estimated amount of refunds or credits shall be subject to disposition as follows:

(A) There shall be transferred and paid over, as soon as practicable after the close of the quarter, to the Government of the Virgin Islands from the amounts so determined a sum equal to the total amount of the revenue collected by the Government of the Virgin Islands during the quarter, as certified by the Government Comptroller of the Virgin Islands. The moneys so transferred and paid over shall con-

stitute a separate fund in the treasury of the Virgin Islands and may be expended as the legislature may determine: *Provided,* That the approval of the President or his designated representative shall be obtained before such moneys may be obligated or expended.

(B) Any amounts remaining shall be deposited in the Treasury of the United States as miscellaneous receipts.

If at the end of any fiscal year the total of the Federal contribution made under subparagraph (A) with respect to the four calendar quarters immediately preceding the beginning of that fiscal year has not been obligated or expended for an approved purpose, the balance shall continue available for expenditure during any succeeding fiscal year, but only for emergency relief purposes and essential public projects, with the prior approval of the President or his designated representative. The aggregate amount of moneys available for expenditure for emergency relief purposes and essential public projects only shall not exceed the sum of $5,000,000 at the end of any fiscal year. Any unobligated or unexpended balance of the Federal contribution remaining at the end of a fiscal year which would cause the moneys available for emergency relief purposes and essential public projects only to exceed the sum of $5,000,000 shall thereupon be transferred and paid over to the Treasury of the United States as miscellaneous receipts.

Organic Act of the Virgin Islands of the United States, ch. 699, 49 Stat. 1807 *et seq.*:

* * * * *

Sec. 35. All taxes, duties, fees, and public revenues collected in the municipality of Saint Croix shall be covered into the treasury of the Virgin Islands and held in account for said municipality and all taxes, duties, fees, and public revenues collected in the municipality of Saint Thomas and Saint John shall be covered into said treasury of the Virgin Islands and held in account for said municipality: *Provided*, That the proceeds of customs duties, less the cost of collection, and the proceeds of the United States income tax, and the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands shall be covered into the treasury of the Virgin Islands and held in account for the respective municipalities, and shall be expended for the benefit and government of said municipalities in accordance with the annual municipal budgets. The Municipal Council of Saint Croix may make appropriations for the purposes of said municipality from, and to be paid out of, the funds credited to its account in the treasury of the Virgin Islands; and the Municipal Council of Saint Thomas and Saint John may make appropriations for the purposes of said municipality from, and to be paid out of, the funds credited to its account in said treasury.

Sec. 36. Taxes and assessments on property and incomes, internal-revenue taxes, license fees, and service fees may be imposed and collected, and royalties for franchises, privileges, and con-

cessions granted may be collected for the purposes of the Government of the Virgin Islands as may be provided and defined by the municipal councils herein established: *Provided,* That all money hereafter derived from any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury of the Virgin Islands and paid out for such purpose only, except when otherwise authorized by the legislative authority having jurisdiction after the purpose for which such fund was created has been accomplished. Until Congress shall otherwise provide, all laws concerning import duties and customs in the municipality of Saint Thomas and Saint John now in effect shall be in force and effect in and for the Virgin Islands: *Provided,* That the Secretary of the Treasury shall designate the several ports and sub-ports of entry in the Virgin Islands of the United States and shall make such rules and regulations and appoint such officers and employees as he may deem necessary for the administration of the customs laws in the Virgin Islands of the United States; and he shall fix the compensation of all such officers and employees and provide for the payment of such compensations and other expenses of the collection of duties, fees, and taxes imposed under the customs laws from the receipts thereof. The export duties in effect on the date of enactment of this Act may be from time to time reduced, repealed, or restored by ordinance of the municipal council having jurisdiction: *Provided further,* That no new export duties shall be levied in the Virgin Islands except by the Congress.

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